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In the Supreme Court of the United States

OCTOBER TERM, 1995

CHARLES T. ROBINSON, SR., PETITIONER

v.

SHELL OIL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

DREW S. DAYS, III
Solicitor General

DEVAL L. PATRICK
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 514-2217

C. GREGORY STEWART
General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

VINCENT BLACKWOOD
Assistant General Counsel

SAMUEL A. MARCOSSON
JOHN F. SUHRE
Attorneys
Equal Employment Opportunity Commission
Washington, D.C. 20507

QUESTION PRESENTED

Whether Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a), which prohibits retaliation for filing a charge of discrimination, makes it unlawful for an employer to retaliate against an individual who has been fired by the employer and therefore no longer works for the employer at the time of the retaliatory act.

TABLE OF CONTENTS

	Page
Interest of the United States and the Equal Employment Opportunity Commission	1
Statement	2
Summary of argument	7
Argument:	
Title VII prohibits employers from retaliating against former employees for filing charges of employment discrimination	8
Conclusion	25

TABLE OF AUTHORITIES

Cases:

Allied Chemical & Alkali Workers of America v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971)	13, 14
Arizona Governing Committee v. *Norris*, 463 U.S. 1073 (1983)	24
Beckham v. *Grand Affair*, 671 F. Supp. 415 (W.D.N.C. 1987)	19
Berry v. *Stevinson Chevrolet*, 74 F.3d 980 (10th Cir. 1996)	19, 25
Burrus v. *United Tel. Co.*, 683 F.2d 339 (10th Cir.), cert. denied, 459 U.S. 1071 (1982)	25
California Human Resources Dep't v. *Java*, 402 U.S. 121 (1971)	12
Charlton v. *Paramus Board of Educ.*, 25 F.3d 194 (3d Cir. 1994)	20
Community For Creative Non-Violence v. *Reid*, 490 U.S. 730 (1989)	15
Crandon v. *United States*, 494 U.S. 152 (1990)	16
Czarnowski v. *Desoto, Inc*, 518 F. Supp. 1252 (N.D. Ill. 1981)	9
EEOC v. *Board of Governors*, 957 F.2d 424 (7th Cir.), cert. denied, 506 U.S. 906 (1992)	18

Cases–continued: Page

EEOC v. *Cosmair, Inc.*, 821 F.2d 1085 (5th Cir. 1987) 18
Flemming v. *Nestor*, 363 U.S. 603 (1960) 13
Garcia v. *Lawn*, 805 F.2d 1400 (9th Cir. 1986) 18
Geduldig v. *Aiello*, 417 U.S. 484 (1974) 13
Grant v. *Bethlehem Steel Corp.*, 622 F.2d 43 (2d Cir. 1980) 25
Hishon v. *King & Spalding*, 467 U.S. 69 (1984) 24
Hobbie v. *Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) 12
Hodgson v. *Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303 (5th Cir. 1972) 19
Holt v. *Continental Group, Inc.*, 708 F.2d 87 (2d Cir. 1983), cert. denied, 465 U.S. 1030, 1038 (1984) . 18
King v. *St. Vincent's Hospital*, 502 U.S. 215 (1991) 9, 16
London v. *Coopers & Lybrand*, 644 F.2d 811 (9th Cir. 1981) 9
Mitchell v. *DeMario Jewelry, Inc.*, 361 U.S. 288 (1960) 18
NLRB v. *Scrivener*, 405 U.S. 117 (1972) 17
Nash v. *Florida Industrial Comm'n*, 389 U.S. 235 (1967) 12
Nationwide Mutual Ins. Co. v. *Darden*, 503 U.S. 318 (1992) 14, 15
Pantchenko v. *C. B. Dolge Co.*, 581 F.2d 1052 (2d Cir. 1978) 9, 12
Parker v. *Baltimore & O.R.R.*, 652 F.2d 1012 (D.C. Cir. 1981) 18
Passer v. *American Chem. Soc'y*, 935 F.2d 322 (D.C. Cir. 1991) 9, 19, 23, 25
Pettway v. *American Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969) 18

Cases–continued: Page

Polsby v. *Chase*, 970 F.2d 1360 (4th Cir. 1992), cert. granted and judgment vacated, 507 U.S. 1048 (1993) 2, 3
Polsby v. *Shalala:*
507 U.S. 1048 (1993) 3
70 Fair Empl. Prac. Cas. (BNA) 800 (D. Md. 1996) 3
Richardson v. *Belcher*, 404 U.S. 78 (1971) 13
Ross v. *Communications Satellite Corp.*, 759 F.2d 355 (4th Cir. 1985) 25
Rutherford v. *American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977) 9
Shehadeh v. *Chesapeake & Potomac Tel. Co.*, 595 F.2d 711 (D.C. Cir. 1978) 9
Shell Oil Co. v. *Iowa Dep't of Revenue*, 488 U.S. 19 (1988) 10
Smith v. *Secretary of the Navy*, 659 F.2d 1113 (D.C. Cir. 1981) 23
Sparrow v. *Piedmont Health Sys. Agency*, 593 F. Supp. 1107 (M.D.N.C. 1984) 9
St. Mary's Honor Center v. *Hicks*, 509 U.S. 502 (1993) 24
Texas Dep't of Community Affairs v. *Burdine*, 450 U.S. 248 (1981) 25
United States v. *American Trucking Ass'ns*, 310 U.S. 534 (1940) 10

Statutes and regulations:

Age Discrimination in Employment Act of 1967, §4(d), 29 U.S.C. 623(d) 16
Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(f), 78 Stat. 255 14
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* ..... *passim*
§ 701(b), 42 U.S.C. 2000e(b) 11

Statutes and regulations–continued: Page

§ 701(c), 42 U.S.C. 2000e(c) 11
§ 701(e), 42 U.S.C. 2000e(e) 11
§ 701(f), 42 U.S.C. 2000e(f) 14
§ 703, 42 U.S.C. 2000e-2 ..... 2, 22
§ 703(a), 42 U.S.C. 2000e-2(a) 22, 23, 24
§ 704, 42 U.S.C. 2000e-3 22
§ 704(a), 42 U.S.C. 2000e-3(a) 2, 8, 9, 23
§ 706(g)(1), 42 U.S.C. 2000e-5(g)(1) 10
§ 717(b), 42 U.S.C. 2000e-16(b) 10
§ 717(c), 42 U.S.C. 2000e-16(c) 11
Employee Polygraph Protection Act of 1988, § 2(4), 29 U.S.C. 2002(4) 16
Employee Retirement Income Security Act of 1974, § 3(2)(A), 29 U.S.C. 1002(2)(A) 14
Fair Labor Standards Act of 1938, § 15(a)(3), 29 U.S.C. 215(a)(3) 16, 17
Labor Management Relations Act, § 302(c)(5), 29 U.S.C. 186(c)(5) 13
Longshore and Harbor Workers' Compensation Act, § 49, 33 U.S.C. 948a 16
National Labor Relations Act, 29 U.S.C. 151 *et seq.* ... 13
§ 8(a)(4), 29 U.S.C. 158(a)(4) 16
Occupational Safety and Health Act of 1970, § 11(c), 29 U.S.C. 660(c) 16
33 U.S.C. 1367 16
42 U.S.C. 300j-9(i) 16
42 U.S.C. 1981 9
42 U.S.C. 1981a(a)(1) 22
42 U.S.C. 5851 16
42 U.S.C. 6971 16
42 U.S.C. 7622 16
42 U.S.C. 9610 16
41 C.F.R. 60-1.32 17
Exec. Order:
No. 11,246, 3 C.F.R. 339 (1964-1965 comp.)..... 16
No. 11,375, 3 C.F.R. 684 (1966-1970 comp.) 16

Miscellaneous: Page

Black's Law Dictionary (6th ed. 1990) 4, 15
2 EEOC Compl. Man. (CCH) (May 1988) 19
EEOC Decision No. 72-0139 (1972) 19
Bergen Evans & Cornelia Evans, *A Dictionary of Contemporary American Usage* (1957) 15

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INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Attorney General and the Equal Employment Opportunity Commission (EEOC) share responsibility for enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which prohibits discrimination in employment on the basis of race, sex, religion, or national origin, and also prohibits retaliation for filing a charge of discrimination. This case directly affects the enforcement responsibilities of the Attorney General and the EEOC. The EEOC

participated as amicus curiae in this case in the court of appeals.

STATEMENT

1. After petitioner was fired by respondent, he filed a charge with the EEOC, alleging that he was terminated because of his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2. He later applied for work with Metropolitan Life Insurance Company, which asked respondent for an employment reference about petitioner. Respondent gave Metropolitan Life a negative reference. Br. in Opp. 5.

Petitioner then filed a second charge with the EEOC, alleging that respondent gave the negative reference in retaliation for his having filed the charge of race discrimination. He also filed this action in district court, alleging that respondent violated the anti-retaliation provision of Title VII, 42 U.S.C. 2000e-3(a), by providing false information and negative job references to prospective employers in retaliation for his charge of race discrimination. Pet. App. A3-A4, A31-A32. The district court dismissed petitioner's claim (*id.* at A62-A63) on the authority of *Polsby* v. *Chase*, 970 F.2d 1360, 1365 (1992), in which the Fourth Circuit concluded that Title VII does not provide a former employee with a cause of action against his or her former employer for acts of retaliation allegedly committed after the employment relationship has ended. Shortly after the district court issued its decision, this Court vacated the court

of appeals' judgment in *Polsby*. *Polsby* v. *Shalala*, 507 U.S. 1048 (1993).[1]

2. a. A divided panel of the Fourth Circuit held that Title VII protects former employees from retaliation (Pet. App. A30-A61), but on rehearing en banc, the court of appeals ruled that it does not (*id.* at A1-A29). With regard to whether retaliation against former employees is prohibited by Title VII, the majority of the en banc court concluded that "the statutory language unambiguously answers the question 'no.'" *Id.* at A10.

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[1] *Polsby* was a Title VII action against the Department of Health and Human Services (HHS). The government did not argue that Title VII does not prohibit retaliation against former employees, but rather obtained dismissal of the case in the district court on the ground that the action was untimely. See 970 F.2d at 1364. The Fourth Circuit, after affirming the district court's ruling that the action was untimely, ruled *sua sponte* and in the alternative that Title VII does not prohibit employers from retaliating against former employees for filing discrimination charges. *Id.* at 1365. In response to Polsby's petition for a writ of certiorari, we informed the Court that we disagreed with the court of appeals' holding on the retaliation issue, but we did not suggest that the Court grant review on that issue. See 92-966 Gov't Br. at 9, *Polsby* v. *Shalala*, 507 U.S. 1048. We also informed the Court that we believed that there remained an issue of material fact on the timeliness question, such that summary judgment should not have been granted. 92-966 Gov't Br. at 9-11. The Court granted certiorari, vacated the judgment, and remanded for reconsideration "in light of the position asserted by the Acting Solicitor General." 507 U.S. at 1048. The court of appeals remanded the case to the district court, and the district court again dismissed the retaliation claim, in light of the en banc court of appeals' decision in this case. *Polsby* v. *Shalala*, 70 Fair Empl. Prac. Cas. (BNA) 800, 802 (D. Md. 1996).

The majority observed that Title VII makes it unlawful for an employer to retaliate against its "employees or applicants for employment," and defines "employee" to mean "an individual employed by an employer." Pet. App. A10-A11 (emphasis omitted). It further noted that Title VII does not expressly define "employee" to include an individual "no longer employed by an employer." *Id.* at A11. From those observations, it concluded that Title VII protects present employees and applicants for future employment, but not former employees, from retaliation. *Ibid.*

The majority rejected the suggestion that the definition of "employee" in Title VII is ambiguous. Since Title VII defines "employee" in terms of being "employed by an employer," the court looked to the definition of "employed" in *Black's Law Dictionary* (6th ed. 1990, at 525): "[p]erforming work under an employer-employee relationship." See Pet. App. A12. It found no basis for concluding that "employed" could mean "no longer performing work under an employer-employee relationship." *Ibid.*

Because it found the statutory language unambiguous, the court believed itself precluded from considering any other source of the statute's meaning unless "literal application of [the] statutory language would lead to an absurd result," or "would produce a result demonstrably at odds with the intent of Congress." Pet. App. A8, A12. The court concluded that it could not look to those "exceptions" to the plain meaning rule in this case because "both require Congress to have made [it] plain [elsewhere] that it intended a result different than literal application would produce." *Id.* at A13. It also believed that Congress's extension of protection from retaliation to *applicants*

for employment corroborated its reading of the statute. Since "applicants for employment" are "persons *distinct* from 'employees,'" the court said, Congress must have recognized the difference between "employees" and non-employees. See *ibid.*

The court cited "other important considerations" in reaching its conclusion that Title VII does not prohibit retaliation against former employees. Pet. App. A13-A14. First, "[t]he types of practices that Title VII forbids are particularly related to *employment*, *not* post-employment relationships." *Id.* at A14. Second, the framework for establishing a *prima facie* case of retaliation developed by the courts requires an "adverse employment action," which "necessarily entails conduct that occurs during the employment relationship." *Ibid.* And since "[a]dverse employment action necessarily requires that the adverse action taken by the employer must be in relation to its own act of *employing* the employee bringing the charge[,] * * * any adverse action taken after the employment has terminated cannot be actionable under Title VII." *Id.* at A15. "Given the types of practices that Title VII forbids, it follows that Congress drew the line defining the scope of Title VII at its most logical place—the termination of the employment relationship." *Ibid.*

b. Judge Hall filed a dissenting opinion, which was joined by Chief Judge Ervin and Judge Michael (Pet. App. A19-A28); Judge Murnaghan also dissented (*id.* at A29). Judge Hall noted that, under the majority's construction of the statute, an employee who was the subject of a retaliatory negative reference mailed on a Friday would have protection under Title VII, but an employee whose similar reference was mailed on the following Monday (after his last day of employment)

would not. *Id.* at A19-A20. He stated that the majority's construction of the statute will "inevitably lead to grossly absurd results; that those results are also plainly unintended can be readily understood by examining Congress's purpose in enacting Title VII." *Id.* at A21-A22.

Emphasizing that Title VII is "sweeping, remedial legislation" with a "detailed enforcement procedure," Judge Hall noted that "Congress understood that Title VII could only be enforced effectively if the persons most aggrieved by discriminatory practices could come forward without fear of retribution." Pet. App. A22-A23. "Unfortunately," he stated, "the majority's construction * * * will actively hinder [Title VII's] enforcement mechanism[,] * * * on two levels." *Id.* at A23. First, it will allow employers "to escape sanctions for behavior that is clearly unlawful." *Ibid.* Second, it will dissuade employees from bringing violations to the attention of the EEOC. *Id.* at A23-A24. "[N]o reasonable employee will come forward if there is any chance that his or her term of employment will soon end, thus giving the employer carte blanche to retaliate." *Id.* at A24.

Judge Hall also found the conclusion "inescapable" that "the term 'employees' is ambiguous." Pet. App. A27. He observed that the statute's definition of "employee"—as an "individual employed by an employer"—is "tautological." *Ibid.* He agreed that the root "employ" is often used to define "the current contractual relationship between a company and a designated worker," but he noted that "that is not its exclusive meaning"; for example, a recent retiree of a company may be referred to as its long-time "employee." *Id.* at A28 & n.9. Thus, he concluded, the

term "admits of more than one meaning," and is, "*ipso facto*, ambiguous." *Ibid.*

SUMMARY OF ARGUMENT

Title VII prohibits an employer from retaliating against an employee who has filed a discrimination charge, even if that employee has left the employer's service by the time the retaliatory act takes place. The court of appeals erred in concluding that the statute's use and definition of the term "employee" require confining Title VII's protection against retaliation to current employees. Title VII uses the word "employee" in several contexts to refer to former as well as current employees, and that meaning is within the common understanding of the term as well. This Court has also, on several occasions, used the term "employee" to include former employees, such as those seeking unemployment compensation, disability insurance, and old-age benefits.

Nor does the statutory definition of "employee" as a person "employed by an employer" counsel a different result. That definition merely confirms that Title VII incorporates common-law agency concepts in determining who is an employee (rather than an independent contractor). The term "employed" is consistent with past, completed employment as well as present employment.

A construction of the statute to protect employees from retaliation by their former employers best promotes the policy of the anti-retaliation provision, which is to ensure that employees are not discouraged from reporting discrimination to the EEOC and the courts. Title VII depends on employee initiative and cooperation with the EEOC to prevent discrimination in the workplace. If employers were able to

threaten employees who have resigned or been fired with retaliation for the filing of charges with the EEOC, employees would be chilled from taking action to report or oppose discrimination. The result would be especially perverse in the case of employees fired for discriminatory reasons; in such cases, the employer's violation of Title VII through a discriminatory discharge would give the employer freedom to retaliate against the discharged employee for complaining to the EEOC about the discrimination.

Construing Title VII to protect former employees against retaliation is fully consistent with the equitable nature of the remedies originally provided by Congress in Title VII, before compensatory and punitive damages were made available to victims of discrimination. An injunction against future violations provides valuable relief against such retaliation. Furthermore, the language of the anti-retaliation provision is not expressly limited to specific adverse actions that take place during the term of employment; it broadly prohibits any employer from discriminating against an employee because he or she has made a charge of discrimination. Nor does protection for former employees against retaliation conflict with the elements of a *prima facie* case for retaliation claims; those elements can easily be modified to cover post-employment retaliation.

ARGUMENT

TITLE VII PROHIBITS EMPLOYERS FROM RETALIATING AGAINST FORMER EMPLOYEES FOR FILING CHARGES OF EMPLOYMENT DISCRIMINATION

Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a), provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment * * * because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing [under Title VII].

It is not disputed in this case that the act of disseminating an adverse reference about an employee, if intended as retaliation for the employee's participation in a Title VII proceeding, violates Section 704(a). "There is little question that the dissemination of adverse employment references can constitute a violation of Title VII if motivated by [retaliatory] intent."[2] The only question in this case is whether that protection against retaliation is available to persons who are no longer employed by the employer at the time that the employer engages in such retaliation. In our view, it is.

1. a. The Court has emphasized on many occasions that the meaning of a statutory term must be

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[2] *London* v. *Coopers & Lybrand*, 644 F.2d 811, 817 (9th Cir. 1981) (relying on Title VII case law to find violation under 42 U.S.C. 1981). See *Pantchenko* v. *C.B. Dolge Co.*, 581 F.2d 1052, 1055 (2d Cir. 1978); *Sparrow* v. *Piedmont Health Sys. Agency*, 593 F. Supp. 1107, 1118-1119 (M.D.N.C. 1984); *Czarnowski* v. *Desoto, Inc.*, 518 F. Supp. 1252, 1257, 1259 (N.D. Ill. 1981); see also *Rutherford* v. *American Bank of Commerce*, 565 F.2d 1162, 1164 (10th Cir. 1977) (informing prospective employer that employee filed charge with EEOC violates Title VII); *Passer* v. *American Chem. Soc'y*, 935 F.2d 322, 331 (D.C. Cir. 1991) (adverse reference may constitute unlawful retaliation under Age Discrimination in Employment Act of 1967); cf. *Shehadeh* v. *Chesapeake & Potomac Tel. Co.*, 595 F.2d 711, 722-723 (D.C. Cir. 1978) (adverse employment reference violates Title VII when motivated by animus based on sex and national origin).

determined with reference to the particular context in which it appears. See *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 542 (1940); *Shell Oil Co.* v. *Iowa Dep't of Revenue*, 488 U.S. 19, 24-25 (1988); *King* v. *St. Vincent's Hospital*, 502 U.S. 215, 221 (1991). In many Title VII contexts, the word "employee" includes former employees. Most prominently, Section 706(g)(1) of Title VII, 42 U.S.C. 2000e-5(g)(1), provides that, if a court finds that an employer has engaged in an unlawful employment practice, the court may order "*reinstatement* or hiring *of employees*." (Emphasis added.) Similarly, when Congress extended Title VII in 1972 to cover the federal government, it required the EEOC to provide for appropriate remedies against employment discrimination in the federal government, "including reinstatement or hiring of employees." 42 U.S.C. 2000e-16(b). In those contexts, the term "employees" clearly includes former employees.

The 1972 amendments to Title VII contain other provisions plainly including former employees within the term "employee." Thus, if a person files a complaint with a federal agency claiming to have been the victim of employment discrimination, agency regulations must ensure that the "employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination." 42 U.S.C. 2000e-16(b). If "employee" did not include former employees, persons terminated from federal employment who claimed discrimination in that termination would not be entitled to the required notice. The statute further provides that "an employee or applicant for employment," if aggrieved by the final decision of the agency or the EEOC on his discrimination complaint, may file a civil action within 90 days

of the final administrative action. 42 U.S.C. 2000e-16(c). Former employees must come within that provision as well; otherwise, employees who have been fired for discriminatory reasons would have no cause of action and would not be covered by the statute of limitations.

On the other hand, not all references to "employees" in Title VII include former employees. Title VII defines "employer" as a person engaged in an industry affecting commerce "who has fifteen or more employees for each working day" during specified periods. 42 U.S.C. 2000e(b). In that context, it is clear that "employer" status is to be determined by counting only the number of persons on the employer's payroll on particular days; former employees are not to be included. Thus, contrary to the court of appeals' conclusion that the word "employee" necessarily has the same meaning every time that it appears in Title VII (Pet. App. A7), the meaning of that term in Title VII depends on the context in which it appears.[2]

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[3] Indeed, some provisions of Title VII even exclude current employees from the reach of the term "employee." The statute's definition of "employment agency," for example, defines it to mean "any person regularly undertaking * * * to procure for employees opportunities to work for an employer." 42 U.S.C. 2000e(c). In a related provision, the statute provides that a labor organization is engaged in an industry affecting commerce (and therefore covered by Title VII) if it operates a hiring hall that "procures for employees opportunities to work for an employer." 42 U.S.C. 2000e(e). In both contexts, the statute uses "employee" to refer to persons in search of a future employment relationship, and not persons currently performing work for an employer.

b. Use of the word "employee" to refer to a former employee is consistent with the common use of the term.[4] One might say, for example, that "the fire at the plant was set by a disgruntled employee" when referring to an employee who had recently been fired. One might also refer to a person just retired from service as a "30-year employee of the federal government." In neither case would the use of the word "employee" be awkward or strained.

This Court has on several occasions used the word "employee" to refer to a former employee. For example, the Court has referred to discharged workers seeking unemployment compensation as "employees." See, *e.g.*, *Hobbie* v. *Unemployment Appeals Comm'n*, 480 U.S. 136, 142 (1987); *California Human Resources Dep't* v. *Java*, 402 U.S. 121, 134 (1971); *Nash* v. *Florida Industrial Comm'n*, 389 U.S. 235, 239 (1968). Similarly, in a case involving disability insurance, the Court referred to persons no longer able to

[4] See *Pantchenko*, 581 F.2d at 1055. The court of appeals in the present case believed that the statutory protection for "employees" against retaliation could cover only current employees because Title VII separately and specifically protects *applicants* for employment. Pet. App. A13. It reasoned that Congress had extended Title VII beyond the actual employment relationship to cover potential *future* employees, but not *past* employees. It concluded that, "[i]f Congress intended Title VII to remedy discrimination [after] the employment relationship, then it could have easily done so by including 'former employee' when defining 'employee.'" *Id.* at A11. But, unlike a former employee, an *applicant* for employment may not be within the common understanding of the meaning of "employee." Congress may therefore have extended Title VII's protection against retaliation to "applicants" in order to make clear that applicants are, in fact, protected.

work and no longer employed (and therefore entitled to receive disability coverage) as "disabled employees." *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971); see also *Geduldig* v. *Aiello*, 417 U.S. 484, 494 (1974) (referring to compensation for "employee disability"). And it has also referred to a retired worker who had become eligible to receive old-age benefits under the Social Security Act as a "covered employee under the Act." *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960).

That is not to say that every statutory reference to "employees" includes all former employees; context may require a more limited construction. For example, in *Allied Chemical & Alkali Workers of America* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), the Court concluded that the National Labor Relations Act (NLRA) does not make the health benefits of retired employees a mandatory subject of collective bargaining, and it noted that, in that context, "employees" does not include retired workers because "retired employees have ceased to work for another for hire." *Id.* at 168. At the same time, the Court noted that "employees" might include "persons who have quit or whose employers have gone out of business," since they are "members of the active work force available for hire and at least in that sense could be identified as 'employees.'" *Ibid.*[5]

[5] Some federal statutes refer even to retired employees as "employees." For example (as the *Allied Chemical Workers* Court acknowledged), Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. 186(c)(5), prohibits payments by an employer to any representative of his employees, but permits employer payments to a trust fund established for the sole benefit of "the employees of such employer." That exemption permits the employer to make payments to the fund for the

2. The court of appeals nevertheless believed that its construction of "employee" was compelled by the statutory definition of "employee" as "an individual employed by an employer." See 42 U.S.C. 2000e(f). The court also looked to a dictionary definition of "employed," and found it as meaning "performing work under an employer-employee relationship." See Pet. App. A12. Because the dictionary definition of "employed" uses a present participle, the court reasoned that "employee" could mean only a person *presently* performing work under an employer-employee relationship. *Ibid.*

The court of appeals misapprehended the purpose of the statutory definition of "employee." As originally enacted, Title VII provided that "[t]he term 'employee' means an individual employed by an employer."[6] This Court has remarked of the same phrase in ERISA's definition of "employee" that the definition "is completely circular and explains nothing." *Nationwide Mutual Ins. Co.* v. *Darden*, 503 U.S. 318, 323 (1992). To the extent that the definition has any significance, it confirms that Congress intended the statute to cover only employment under "the conventional master-servant relationship as

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benefit of retired employees. See 404 U.S. at 169. Similarly, the Employee Retirement Income Security Act of 1974 (which, as its name shows, is directed principally at benefits payable and paid to former employees), defines an "employee pension benefit plan," the focus of that Act, as a plan that "provides retirement income to employees." 29 U.S.C. 1002(2)(A).

[6] See Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(f), 78 Stat. 255. The definition of "employee" has since been amended to exclude certain employees of state and local governments, and to include United States citizens employed outside the United States. See 42 U.S.C. 2000e(f).

understood by common-law agency doctrine," rather than more expansive concepts that would traditionally have been viewed as falling within an independent contractor relationship. See *id.* at 322-324; cf. *Community For Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739-740 (1989). Thus, the definition of "employee" indicates that Title VII protects employees from discrimination by those with whom they have or had an *employment* relationship, and does not address discrimination in other forms of contracting.

The statutory definition of "employee" as an individual "employed by an employer" is also grammatically consistent with both present and past employment. As leading commentators on language have explained, the third form of a verb (such as "employed") can refer to either a *past* action or a *passive* action, and "the form itself does not express time." See Bergen Evans & Cornelia Evans, *A Dictionary of Contemporary American Usage* 353 (1957) (Evans & Evans). An "individual employed by an employer" can, logically and linguistically, refer both to a person currently employed by an employer and to one previously so employed.

The same is true of the dictionary definition of "employed" that the court of appeals consulted. That source defines "employed" to mean, among other things, "[p]erforming work under an employer-employee relationship." *Black's Law Dictionary* 525 (6th ed. 1990). The court of appeals evidently believed that "performing" work could be understood only as referring to activity in the present tense, but that is incorrect. The present or active participle form "does not show time and is used in past tense phrases as well as in present." Evans & Evans, *supra*, at 353.

3. The plain language of Title VII, therefore, presents no obstacle to a construction of "employee" to include former employees of an employer. At a minimum, the language of the statute is ambiguous on the point. And in construing a statute, the Court should adopt that sense of its words which best promotes the policy and objectives of the legislature. *St. Vincent's Hospital*, 502 U.S. at 221; *Crandon* v. *United States*, 494 U.S. 152, 158 (1990). In the present situation, a construction of the statute to protect former employees from retaliation by employers for participating in Title VII proceedings is necessary to advance the objectives of the statute. The contrary interpretation offered by the court of appeals, on the other hand, would seriously impair the statute's effectiveness.

Strong protection from retaliation toward employees who complain to, or cooperate with, the EEOC is essential to the effectiveness of Title VII, as well as other federal statutes that prohibit retaliation against employees.[7] As the Court noted in construing

[7] The Age Discrimination in Employment Act of 1967 prohibits retaliation against "employees" who file charges, 29 U.S.C. 623(d), as do the Fair Labor Standards Act of 1938, 29 U.S.C. 215(a)(3), the National Labor Relations Act, 29 U.S.C. 158(a)(4), and the Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c). There are also prohibitions on retaliation against "employees" in the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 948a, the Employee Polygraph Protection Act of 1988, 29 U.S.C. 2002(4), and several whistleblower protection statutes, see 42 U.S.C. 5851; 42 U.S.C. 7622; 42 U.S.C. 300j-9(i); 42 U.S.C. 6971; 42 U.S.C. 9610; and 33 U.S.C. 1367. In addition, Executive Order No. 11,246, as amended by Executive Order No. 11,375, prohibits government contractors from discriminating against any "employee or applicant for employment because of race, color, religion, sex, or national origin"; the Department of Labor has issued a regulation based on that Order that prohibits acts intended to interfere with an employee's right to file a discrimination complaint or otherwise cooperate with the government. 41 C.F.R. 60-1.32.

the anti-retaliation provision of the NLRA, "'Congress has made it clear that it wishes all persons with information about [prohibited practices] to be completely free from coercion against reporting them to the [authorities.]' * * * This complete freedom is necessary * * * 'to prevent the [government's] channels of information from being dried up by employer intimidation of prospective complainants and witnesses.'" *NLRB* v. *Scrivener*, 405 U.S. 117, 121-122 (1972). The Court has recognized that the same is true of the anti-retaliation provision of the Fair Labor Standards Act of 1938 (FLSA):

> For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances. This end the prohibition * * * against discharges and other discriminatory practices was designed to serve. For it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions. * * * Congress sought to foster a

climate in which compliance with the substantive provisions of the Act would be enhanced.

Mitchell v. *DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

The EEOC's enforcement of Title VII is equally dependent on cooperation by employees (as both complainants and witnesses).[8] That cooperation could be severely chilled without broad protection from retaliation. As with the NLRA and the FLSA, Title VII is enforced through the initiative of individuals' complaints to the agency and the courts, rather than detailed federal supervision of the workplace. Congress therefore prohibited retaliation "in clear, absolute terms."[9] Congress recognized that retaliation "is likely to cause irreparable harm to the public interest in enforcing the law by deterring others from filing charges." *Garcia* v. *Lawn*, 805 F.2d 1400, 1405 (9th Cir. 1986). Retaliation also "carries with it the distinct risk that other employees may be deterred from * * * providing testimony for the plaintiff in her effort to protect her own rights." *Holt* v. *Continental Group, Inc.*, 708 F.2d 87, 91 (2d Cir. 1983), cert. denied, 465 U.S. 1030, 1038 (1984).

An employee's need for protection against retaliation by a former employer does not end when the employee resigns or is fired. A threat of post-employment retaliation could seriously chill victims

[8] See *EEOC* v. *Board of Governors*, 957 F.2d 424, 431 (7th Cir.), cert. denied, 506 U.S. 906 (1992); *EEOC* v. *Cosmair, Inc.*, 821 F.2d 1085, 1090 (5th Cir. 1987); *Parker* v. *Baltimore & O.R.R.*, 652 F.2d 1012, 1019 (D.C. Cir. 1981); *Pettway* v. *American Cast Iron Pipe Co.*, 411 F.2d 998, 1005 (5th Cir. 1969).

[9] *Parker*, 652 F.2d at 1019.

of, or witnesses to, discrimination from complaining to the EEOC or cooperating with EEOC investigations. It is, moreover, particularly important for employees to have protection against retaliation in the form of the dissemination of adverse employment references.[10] Almost every employee will, at some point, need a reference from a former employer; "it is a fact of business life" that employers require prospective employees to provide references from former employers. See *Hodgson* v. *Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303, 306 (5th Cir. 1972). Employees understand that "post-employment blacklisting is sometimes more damaging than on-the-job discrimination because an employee subject to discrimination on the job will often continue to receive a paycheck while a former employee subject to retaliation may be prevented from

[10] Although this case involves adverse employment references, the lower courts have recognized that post-employment retaliation for filing a discrimination charge can take many forms, all of which can seriously chill employees' willingness to complain to or cooperate with the EEOC, and can therefore impair the EEOC's ability to investigate and prevent discrimination. See *Berry* v. *Stevinson Chevrolet*, 74 F.3d 980, 985 (10th Cir. 1996) (institution of criminal charges as retaliation for filing race discrimination complaint); *Passer*, 935 F.2d at 331 (cancellation of symposium in honor of retired employee because he filed complaint of age discrimination); *Beckham* v. *Grand Affair*, 671 F. Supp. 415, 419 (W.D.N.C. 1987) (allegation that employer caused former employee to be arrested and prosecuted). The EEOC has also concluded that the unwarranted contesting of an unemployment compensation claim in retaliation for filing a discrimination charge constitutes unlawful retaliation under Title VII. See EEOC Compl. Man. § 614.7(f) (CCH) at 3136 (May, 1988) (discussing EEOC Decision No. 72-0139 (1972)).

obtaining any work in the trade or occupation previously pursued." *Charlton* v. *Paramus Board of Educ.*, 25 F.3d 194, 200 (3d Cir. 1994). Employees' need for references therefore makes them highly vulnerable to intimidation by employers into remaining silent about discrimination in the workplace—exactly the danger to which the anti-retaliation provision of Title VII is addressed. An employee who has reason to fear that a current employer will retaliate in the future because of complaints about discrimination, cooperation with the EEOC, or court testimony is likely to remain silent rather than run the risk of being "blacklisted."

Under the court of appeals' rule, an employer could deter its employees from filing discrimination charges, cooperating with the EEOC, or testifying in court by making it known that any employee who did so would be blacklisted, or suffer some other serious adverse consequence, after he or she left the company and then needed another job. Faced with that prospect, an employee who believed that he or she had been the victim of discrimination (or had observed discrimination at the workplace) might easily be intimidated into suffering the employer's discrimination in silence. Employees could be deterred from filing discrimination charges even after resigning because of discriminatory conditions, since the act of filing such a charge would carry the implicit cost of enabling their former employers to report them to prospective employers as troublemakers.

The court of appeals' rule also creates incentives for perverse and counterproductive behavior. On the one hand, it may actually encourage employers with a discriminatory animus to fire the victims of that bias, since those fired employees, unlike current ones,

could be retaliated against without statutory limitation. On the other hand, it may lead employees suffering from discrimination to hang on at all costs to employment with a discriminatory employer rather than seek another position, since protection against retaliation would disappear as soon as they left the company. See Pet. App. A23-A24 (Hall, J., dissenting). The purpose of the anti-discrimination provision of Title VII, however, is to ensure that the filing of charges does not affect employment decisions in any way; an employee should be free to leave or stay, without fear that he or she will suffer for having filed an employment discrimination charge.

As Judge Hall pointed out (Pet. App. A19-A20), the court of appeals' rule also leads to arbitrary distinctions among fact patterns that should be treated similarly. Assume, for example, that two current employees both file discrimination charges with the EEOC and both explore employment possibilities with other companies, who request references from their current employer. Assume further that the employer reacts by mailing false, adverse employment references, and that both employees decide to leave the company rather than endure further discrimination. If the adverse employment reference as to one of the employees is mailed out on the day after that employee leaves, that employee will not have an action against the employer for retaliation under the court of appeals' rule, while the other employee will have such an action, if her reference is mailed the day before she leaves the company. *Ibid.* There is no basis in Title VII for treating those situations differently.

4. Respondent and the court of appeals have advanced several other reasons based on the

structure of the statute to suggest that Title VII does not prohibit retaliation against former employees. First, respondent points out that Title VII, as originally enacted, provided only equitable relief for violations. It then suggests (Br. in Opp. 14) that it would be difficult to fashion an equitable remedy for retaliation against a former employee. That suggestion is incorrect; an injunction against future violations of the statute could be quite valuable to an employee who has suffered retaliation. An employee who was being blacklisted by a former employer might well seek an injunction against that employer to prevent further dissemination of the adverse reference, even if he or she could not prove or obtain compensatory damages resulting from the violation.[11]

Second, the court of appeals suggested that Title VII could not be construed to protect former employees against retaliation because "[t]he types of practices" prohibited by Title VII "are particularly related to *employment*, *not* post-employment relationships." Pet. App. A14. Referring to the definition of "an unlawful employment practice" in Section 703(a) of Title VII, 42 U.S.C. 2000e-2(a)(1), the court concluded that "[t]his definition comprises discrimination with respect to certain aspects of employment, and does not redress discriminatory practices *after* the employment relationship has terminated." Pet. App. A14.

That analysis reflects a misunderstanding of Title VII in several respects. It overlooks important differences between Section 703 and Section 704 of Title

[11] Federal law now provides for compensatory and punitive damages against an employer who engages in unlawful retaliation in violation of Title VII. See 42 U.S.C. 1981a(a)(1).

VII. Section 703(a) declares it to be an "unlawful employment practice" to violate Title VII's substantive prohibition against discrimination with respect to certain specified actions by employers, all of which are related to employment.[12] Section 704(a) provides that it shall *also* be an "unlawful employment practice" to discriminate against a covered individual "because he has made a charge" under Title VII. Violations of Section 704(a) are not limited to the "unlawful employment practice[s]" listed in Section 703(a). Rather, Section 704(a) "speaks unconditionally, without limitation to acts causing particular harms such as the loss of a particular job or promotion." *Smith* v. *Secretary of the Navy*, 659 F.2d 1113, 1119 n.56 (D.C. Cir. 1981); see also *Passer* v. *American Chem. Soc'y*, 935 F.2d 322, 331 (D.C. Cir. 1991).

The unconditional nature of Section 704(a) reflects its broad purpose of ensuring the effectiveness of the prohibitions on employment discrimination. Acts of retaliation motivated to punish employees for filing discrimination charges threaten to impair the effectiveness of the administrative machinery for investigating, punishing, and deterring violations of Title VII. The threat of retaliation is likely to chill employees' willingness to file charges and to cooperate with the EEOC in investigating discrimi-

[12] Section 703(a) provides that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a).

nation, even if that retaliation occurs after the employee has resigned.

Moreover, while the main focus of Section 703(a) is indeed on the ongoing employment relationship, the court of appeals was incorrect in its apprehension that Section 703(a) prohibits only discrimination that is completed during the term of employment. "Pension benefits, for example, qualify as terms, conditions, or privileges of employment even though they are received only after employment terminates," *Hishon* v. *King & Spalding*, 467 U.S. 69, 77 (1984), and yet no one would suggest that Title VII permits an employer to discriminate on the basis of race in paying out pensions. See *Arizona Governing Committee* v. *Norris*, 463 U.S. 1073, 1081-1082 (1983). The same is true of employment references. It is entirely reasonable to consider post-employment references to be a term, condition, or privilege of employment, since it is routine for employees to request them of their past employers and for employers to provide them.

Finally, the court of appeals suggested (Pet. App. A14-A15) that Title VII does not address post-employment retaliation because "the second element of a *prima facie* case of retaliation under Title VII requires the employee to suffer an 'adverse employment action' that necessarily entails conduct that occurs during the employment relationship." That basis for its conclusion is particularly unpersuasive. The *prima facie* case established for Title VII cases is not an element of the statute, but is a judicially created "allocation of the burden of production and an order for the presentation of proof." *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502, 506 (1993). If the *prima facie* case for retaliation claims generally requires proof of an adverse employment action, that

is because retaliation frequently takes the form of adverse employment actions against current employees.[13] The requirements of a *prima facie* case in a Title VII action are not "rigid, mechanized, or ritualistic," however (see *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 n.6 (1981)), and the elements of a *prima facie* case of retaliation can be readily modified to include adverse actions taken after the employment relationship has ended.[14]

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

DEVAL L. PATRICK
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

C. GREGORY STEWART
General Counsel

GWENDOLYN YOUNG REAMS
Associate General Counsel

VINCENT BLACKWOOD
Assistant General Counsel

SAMUEL A. MARCOSSON
JOHN F. SUHRE
Attorneys
Equal Employment Opportunity Commission

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[13] See, *e.g.*, *Ross* v. *Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985); *Burrus* v. *United Tel. Co.*, 683 F.2d 339, 343 (10th Cir.), cert. denied, 459 U.S. 1071 (1982); *Grant* v. *Bethlehem Steel Corp.*, 622 F.2d 43, 46 (2d Cir. 1980).

[14] See, *e.g.*, *Passer*, 935 F.2d at 331; *Berry*, 74 F.3d at 985.